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LEGISLATIVE SUMMARY

Bill C-43:

An Act to Amend the Immigration and Refugee Protection Act (Faster Removal of Foreign Criminals Act)

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Legislative Summary of Bill C-43

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL C-43: AN ACT TO AMEND THE IMMIGRATION AND REFUGEE PROTECTION ACT (FASTER REMOVAL OF FOREIGN CRIMINALS ACT)

1 BACKGROUND

Bill C-43, An Act to Amend the Immigration and Refugee Protection Act (short title: Faster Removal of Foreign Criminals Act) was introduced in the House of Commons on 20 June 2012 by the Minister of Citizenship, Immigration, and Multiculturalism, the Honourable Jason Kenney.

Bill C-43 focuses on the inadmissibility-related provisions of the *Immigration and Refugee Protection Act* (IRPA),[1] which determine who may not enter or remain in Canada. Background information provided by Citizenship and Immigration Canada (CIC) suggests that the legislation is the outcome of an inter-departmental review of IRPA's inadmissibility and other related provisions.[2]

Specifically, Bill C-43 makes several changes related to:

- evaluating inadmissibility;
- the consequences of being found inadmissible on certain grounds and of having an inadmissible family member; and
- granting relief from inadmissibility.

In addition, it gives the Minister of Citizenship and Immigration the power to prevent an individual from obtaining or renewing temporary resident status.

Finally, the bill introduces two other changes:

- it provides for new regulatory authorities for immigration applications; and
- it creates a formal procedure for the renunciation of permanent resident status.

1.1 Current Inadmissibility-Related Provisions

Under IRPA, people are inadmissible to Canada on the following nine grounds:

- security;
- violation of human rights;
- serious criminality and criminality;[3]
- organized criminality;
- health;
- financial reasons;
- misrepresentation;
- non-compliance with the Act; and

- being a family member of an inadmissible person.

Foreign nationals, which means individuals who are not Canadian citizens, permanent residents, or Indians under the *Indian Act*, may be found inadmissible during the visa application process, at a point of entry to Canada, or when making in-Canada applications. A permanent resident, who is someone who has acquired permanent resident status by immigrating to Canada, but is not yet a Canadian citizen, may also be found inadmissible.

For those in Canada, the first step in determining inadmissibility is a report by a CIC or Canada Border Services Agency (CBSA) officer who is of the opinion that a permanent resident or a foreign national is inadmissible. The report is submitted to a delegate of the Minister. If the Minister's delegate is of the opinion that the case is well-founded, he or she may refer the report to the Immigration Division of the Immigration and Refugee Board of Canada (IRB) for an admissibility hearing. The Immigration Division is an administrative tribunal where principles of natural justice apply.

Some situations can be handled by the Minister's delegate and do not require referral for a hearing. These include the case of a permanent resident who is inadmissible solely on the grounds that he or she has failed to comply with the residency obligation (section 44(2) of IRPA) and the case of foreign nationals who are inadmissible for a variety of mostly administrative reasons (as set out in the *Immigration and Refugee Protection Regulations* (section 228 of IRPR). In these cases, the Minister's delegate is authorized to issue the appropriate removal order, whether a deportation order, an exclusion order, or a removal order issued to a family member.[4]

When an admissibility hearing is held, the Immigration Division renders a decision stating that:

- the person is a Canadian citizen, registered Indian or a permanent resident and therefore has a right to enter Canada; or
- the foreign national meets the requirements of IRPA and grants the individual permanent resident status or temporary resident status; or
- the Immigration Division is not satisfied that the foreign national wishing to enter Canada is not inadmissible or that it is satisfied that the foreign national or the permanent resident in Canada is inadmissible and makes the applicable removal order.[5]

In some cases, inadmissibility can be overcome and the person may enter or remain in Canada. Visa and border services officers may issue a Temporary Resident Permit to an inadmissible individual, allowing that person to enter Canada for a short stay. IRPA also includes relief provisions for certain types of inadmissibility, at the discretion of the Minister of Public Safety and Emergency Preparedness. Where a person would normally be inadmissible on the grounds of security, violating human or international rights, or organized criminality, the Minister may approve an exception to his or her inadmissibility if satisfied that the individual's presence in Canada would not be detrimental to the national interest.

1.2 Options for People Found Inadmissible and Facing Removal

With some exceptions,[6] permanent residents and protected persons[7] may appeal a removal order made at an examination or admissibility hearing to the Immigration Appeal Division of the IRB. The Minister may also appeal these decisions to the Immigration Appeal Division, which may:

- allow the appeal, which means that the original decision is set aside and substituted by that of the Immigration Appeal Division or referred for reconsideration;
- stay the removal order with conditions if considered necessary; or
- dismiss the appeal and make a removal order.[8]

Persons facing removal from Canada may also be eligible for a Pre-Removal Risk Assessment, which is generally a paper review evaluating the risks that the individual would face if he or she were returned to the country of origin. If the application is approved, the person in question is granted refugee protection. While people found inadmissible on grounds of security, violating human or international rights, organized criminality, or serious criminality are restricted from this protection and therefore from permanent residence, removal orders regarding these individuals may be stayed following a positive Pre-Removal Risk Assessment (section 114(*b*) of IRPA).

Finally, a person found inadmissible and facing removal could submit an application for permanent residence on humanitarian and compassionate considerations (sections 25, 25.1 and 25.2 of IRPA). This type of application is used to overcome inadmissibility or another requirement of IRPA and is intended for exceptional circumstances. The criteria taken into account are the best interests of a child directly affected, how well established the foreign national is in Canada and what hardship the foreign national would suffer if he or she had to leave ("unusual, undeserved or disproportionate hardship"). Submitting an application for permanent residence on humanitarian and compassionate grounds does not result in an automatic stay of removal from Canada.

2 DESCRIPTION AND ANALYSIS

2.1 Changes to Inadmissibility-Related Provisions

2.1.1 Evaluating Inadmissibility

2.1.1.1 Change to Inadmissibility on the Grounds of Security (Clause 13)

Section 34 of IRPA makes a person inadmissible to Canada for reasons of national security, which include engaging in such activities as:

- espionage (section 34(1)(*a*));
- subversion (overthrowing a government) (sections 34(1)(*a*) and (*b*));

- terrorism (section 34(1)(*c*)); and
- acts of violence that might endanger the lives of persons in Canada (section 34(1)(*e*)).

Being a danger to the security of Canada (section 34(1)(*d*)) or being a member of an organization that there are reasonable grounds to believe engages, has engaged, or will engage in acts of espionage, subversion or terrorism (section 34(1)(*f*)) are also grounds for inadmissibility under this section.

Currently section 34(1)(*a*) of IRPA provides that a permanent resident or a foreign national is inadmissible for an act of espionage or an act of subversion against a democratic government, institution, or process as they are understood in Canada. Bill C-43 amends section 34(1)(*a*) of IRPA so that acts of espionage against Canada alone or that are contrary to Canada's interest constitute a basis for inadmissibility. Engaging in an act of subversion, either by force (section 34(*b*)) or otherwise (new section 34 (*b.1*)) is still grounds for inadmissibility.

2.1.1.2 Obligation to Appear for Examination or for Interview with CSIS (Clause 5)

Under section 15 of IRPA an officer has the authority to examine persons making an application under the Act, and under section 16, applicants are obligated to answer all questions truthfully and provide a visa and all relevant evidence and documents. Clause 5 of Bill C-43 modifies section 16 of IRPA to add an obligation for applicants to appear for examination at the request of an officer (new section 16(1.1)). Furthermore, a foreign national who makes an application also has the obligation to appear for an interview with agents of the Canadian Security Intelligence Service (CSIS) if the officer has made such a request (new section 16(2.1)). CSIS provides advice to CBSA and CIC officers in relation to screening for inadmissibility on the grounds of security.

2.1.2 Consequences of Being Found Inadmissible or Having an Inadmissible Family Member

2.1.2.1 No Humanitarian and Compassionate Applications for Foreign Nationals with Inadmissibility Stemming from Sections 34, 35 and 37of IRPA (Clauses 9 and 10)

Applications for permanent residence based on humanitarian and compassionate considerations (described in section 1.2, above) can be made by a foreign national or on the Minister's initiative. Bill C-43 modifies sections 25 and 25.1 of IRPA so that a foreign national determined to be inadmissible on security grounds, for violating human and international rights, or for organized criminality is ineligible for permanent residence based on humanitarian and compassionate considerations.

This change eliminates one of the options for entering or staying in Canada for this group of inadmissible persons, leaving only ministerial relief and the Pre-Removal Risk Assessment. As explained above, a positive Pre-Removal Risk Assessment for those inadmissible on grounds of security, violating human or international rights,

organized criminality, or serious criminality does not confer protected person status but instead stays removal from Canada.

2.1.2.2 Increased Penalty for Misrepresentation (Clause 16)

Misrepresentation is the act of making false statements or omissions that mislead an officer in the application of IRPA. It is one of the grounds of inadmissibility, as set out in section 40 of IRPA. Clause 16 of Bill C-43 increases the penalty for misrepresentation, so that the permanent resident or foreign national who misrepresents may not enter or remain in Canada for five years instead of for the current two years (revised section 40(2)(*a*)). Clause 16 also establishes that a foreign national cannot apply for permanent resident status while he or she is inadmissible for misrepresentation (new section 40(3)).

2.1.2.3 New Definition of Serious Criminality as It Applies to Access to the Immigration Appeal Division (Clause 24)

Section 36 of IRPA defines inadmissibility on grounds of serious criminality, using sentence terms in Canada and their equivalents for acts committed outside Canada. Specifically, section 36 of IRPA establishes that a foreign national or permanent resident is inadmissible on grounds of serious criminality if he or she has:

- been convicted in Canada of an offence punishable by a maximum term of imprisonment of at least 10 years (section 36(1)(*a*));
- been convicted in Canada of an offence for which imprisonment of more than six months had been imposed (section 36(1)(*a*));
- been convicted outside Canada of an offence that, if committed in Canada, would be an offence punishable by a maximum term of imprisonment of at least 10 years (section 36(1)(*b*)); or
- committed an act outside Canada that is an offence where it was committed and, if committed in Canada, would be an offence punishable by a maximum term of imprisonment of at least 10 years (section 36(1)(*c*)).

As stipulated in section 64 of IRPA, some people who are inadmissible for serious criminality may not access the Immigration Appeal Division to appeal their inadmissibility finding and removal order. Bill C-34 expands the scope of this group to include people sentenced in Canada to lesser sentences and people who committed crimes outside Canada.

Clause 24 introduces a new definition of serious criminality for the purpose of denying access to the Immigration Appeal Division (new section 64(2) of IRPA). Under the current IRPA, serious criminality is defined for this purpose as a crime punished in Canada by a term of two years of imprisonment. Bill C-43 expands the scope of people ineligible to appeal by indicating that serious criminality constitutes a crime punished in Canada by a term of at least six months' imprisonment.

It also introduces a new element, in eliminating rights of appeal for those found inadmissible on grounds of serious criminality for convictions or committing actions

that constitute an offence outside Canada and that, if committed in Canada, would be an offence punishable by a maximum term of imprisonment of at least 10 years (sections 36(1)(*b*) and (*c*) of IRPA).

2.1.2.4 Conditions for Persons Found Inadmissible on Grounds of Security (Clauses 19, 22, 23, 25, 26, 27 and 36(11))

Bill C-43 imposes mandatory or prescribed conditions in a variety of situations on an individual who may be or has been found to be inadmissible on grounds of security (such as espionage, subversion, terrorism). CBSA officers, the members of the Immigration Division, the Minister of Public Safety and Emergency Preparedness and Federal Court judges are directed to impose these minimum conditions.

Regulations may be drafted regarding the conditions the officer, the Immigration Division or the Minister must impose when releasing an individual who is the subject of either a report on inadmissibility on grounds of security that is referred to the Immigration Division or a removal order for inadmissibility on grounds of security (clauses 23 and 36(11)). Regulations may also be drafted in the matter of conditions a judge must impose when releasing an individual who is the subject of a security certificate (clause 27).

2.1.2.4.1 When the Officer Imposes the Prescribed Conditions (Clauses 19 and 22)

Under Bill C-43, CBSA officers must impose the prescribed conditions in two situations that fall within their responsibility:

- where the subject of a report on inadmissibility on grounds of security who is referred to the Immigration Division for an admissibility hearing is not detained (clause 19; new section 44(4) of IRPA); or
- where the subject of either a report on inadmissibility on security grounds or a removal order on security grounds is released before the first detention review by the Immigration Division because the officer believes that the reasons for the detention no longer exist (clause 22; new section 56(2) of IRPA).

2.1.2.4.2 When the Immigration Division Imposes the Prescribed Conditions (Clauses 23 and 36(7)(*a*))

The Immigration Division of the IRB is responsible not only for admissibility hearings, but also for detention reviews. If a permanent resident or a foreign national is detained, the Immigration Division will review his or her detention according to a schedule in IRPA and consider whether the following factors justify continued detention:

- the person's identity is unknown;
- the person presents a flight risk; or
- the individual is a danger to society.[9]

The Immigration Division must carefully weigh the evidence before rendering a decision of continued detention, including alternatives for detention, such as bonds from family members, as Canadian law does not allow for indefinite detention of a person.

Bill C-43 directs the Immigration Division to impose the prescribed conditions on an individual who is released and is subject either to a report on inadmissibility based on security grounds or to a removal order for inadmissibility based on security grounds (clauses 23 and 36(7)(*a*); new section 58(5) of IRPA).

2.1.2.4.3 When the Minister Imposes the Prescribed Conditions (Clauses 25 and 36(10))

The Minister of Public Safety and Emergency Preparedness is specifically directed to impose the prescribed conditions on designated foreign nationals and those identified in security certificates. Designated foreign nationals are those individuals who arrived in Canada by means of an event designated as an irregular arrival by the Minister of Public Safety and Emergency Preparedness.

Section 58.1 of IRPA provides that the Minister may release a designated foreign national, irrespective of the scheduled detention regime. Bill C-43 amends IRPA to specify that when the Minister releases a designated foreign national who is the subject of a report on inadmissibility on security grounds or of a removal order on security grounds, he or she must also impose the prescribed conditions (clause 36(10); new section 58.1(4)of IRPA).

Bill C-43 modifies the current security certificate regime to include mandatory conditions in specific situations. Security certificates date back to 1977, and are used when the basis of the finding of inadmissibility on grounds of security is classified information. Both the Minister of Citizenship and Immigration Canada and the Minister of Public Safety and Emergency Preparedness must sign the certificate,[10] which is then referred to the Federal Court for review. If the Federal Court deems it reasonable, the security certificate becomes a removal order that will be enforced as soon as possible. Removal will not occur if there is substantial risk of persecution, torture or unusual and cruel punishment in the country of origin, as per Canada's obligations of non-refoulement.[11]

Clause 25 of Bill C-43 adds section 77.1 to IRPA, which instructs the Minister of Public Safety and Emergency Preparedness to impose the prescribed conditions on an individual who is the subject of a security certificate referred to the Federal Court when there is no parallel action to detain the individual.

2.1.2.4.4 When the Federal Court Judge Imposes the Prescribed Conditions (Clause 26)

People detained on security certificates have their detentions reviewed by the Federal Court.

Clause 26 of Bill C-43 amends section 82 of IRPA to direct a Federal Court judge to impose the prescribed conditions when, after reviewing the reasons for detaining the

subject of a security certificate, he or she decides to release the individual. The prescribed conditions are not subject to review and cannot be varied. The judge may impose other conditions, but the prescribed conditions must be included.

2.1.2.4.5 When the Prescribed Conditions Cease to Apply (Clauses 19 and 25)

The mandatory conditions are rescinded if the security concerns are addressed – whether the person is found innocent of the suspicion, or the suspicion is confirmed and actions are taken to further limit the risk to Canada (clauses 19 and 25; new sections 44(5) and 77.1(2) of IRPA). Specifically, Bill C-43 provides that the prescribed conditions cease to apply if any of the following five events occur:

- the person is detained;
- the report on inadmissibility is withdrawn;
- the final determination is not a removal order against the individual for inadmissibility on grounds of security;
- the Minister makes a declaration under section 42.1 of IRPA which denies the individual the right to enter or remain in Canada for a specific period; or
- a removal order is enforced against the person, so that this person is no longer physically present in Canada.

2.1.2.5 Changes to Section 42: Inadmissible Family Member (Clause 17)

Currently, IRPA states in section 42 that a foreign national cannot enter or remain in Canada if he or she is accompanying a family member who is inadmissible. If the foreign national has a non-accompanying family member who is inadmissible, the foreign national may enter Canada as long as he or she has not made an application for permanent residence and the non-accompanying inadmissible family member is not a spouse or a dependent child.[12]

Bill C-43 amends IRPA so that temporary residents and applicants for that status are inadmissible if their family member is inadmissible on grounds of security, violating human and international rights, or organized criminality, even if the inadmissible person is non-accompanying. However, a foreign national seeking temporary resident status cannot be deemed inadmissible solely based on a familial relationship to a person found inadmissible on any other ground (new section 42(2) of IRPA).

2.1.3 Ministerial Relief from Inadmissibility Stemming from Sections 34, 35 and 37 of IRPA

2.1.3.1 Application Process, Minister's Own Initiative, Factors to Consider (Clauses 2, 3, 13, 14, 15, 18 and 36(2))

Bill C-43 consolidates into one clause provisions regarding ministerial relief from inadmissibility based on security grounds, violating human and international rights, or organized criminality. Clause 18 creates new section 42.1, which indicates that the

Minister may, either on application by a foreign national who would be otherwise inadmissible or on the Minister's own initiative, declare that he or she is satisfied that it is not contrary to the national interest to let the foreign national enter or remain in Canada. This formalizes the process for the foreign national, and adds the concept of the Minister's initiative that exists in other discretionary decisions in IRPA, such as permanent residence on humanitarian and compassionate considerations.

Clause 18 also brings a new element into IRPA: it articulates in legislation the factors that the Minister may consider in granting relief. The Minister is limited to national security and public safety considerations when reaching his or her decision about a foreign national. This enshrines in legislation the interpretation of IRPA articulated by the Federal Court of Appeal in the decision *Canada (Public Safety and Emergency Preparedness)* v. *Agraira*,[13] the appeal of which is set to be heard in October 2012 at the Supreme Court of Canada.[14] The Federal Court of Appeal analyzed how the enabling authority for establishing policies and determinations concerning inadmissibility based on national interest – security, violating human and international rights, or organized criminality – changed from the Minister of Citizenship and Immigration to the Minister of Public Safety after the creation of the Canada Border Services Agency.[15] According to the court, if ministerial relief previously included humanitarian and compassionate considerations, it is clear that today they are considered as part of a separate process under the responsibility of a different minister. Clause 18 further explains that, in the Minister's assessment of relief, national security and public safety considerations are broader than the question of whether the foreign national presents a danger to the public or the security of Canada (new section 42.1(3) of IRPA).

Section 6(3) of IRPA does not allow the Minister of Public Safety and Emergency Preparedness to delegate the decision of whether to grant ministerial relief from inadmissibility based on security grounds, violating human and international rights, or organized criminality. This is maintained in Bill C-43 (clause 3 and confirmed in transitional clause 36(2)).

It is worth noting that the integration into one section of the power to grant ministerial relief from inadmissibility based on security, the violation of human and international rights, or organized criminality amends or repeals various sections of IRPA (clauses 2, 3, 13(3), 14 and 15). This includes an amendment, in clause 15, to maintain the provision that an individual who enters Canada with the assistance of organized crime is not inadmissible on grounds of organized criminality (section 35(2) of IRPA).

2.2 New Discretionary Ministerial Power of Declaration Regarding Foreign Nationals (Clauses 3, 6, 7, 8 and 11)

Clause 8 gives the Minister of Citizenship and Immigration the authority to issue a declaration regarding a foreign national (new section 22.1 of IRPA). This declaration, made by the Minister on his or her own initiative, has the effect of not allowing a foreign national to become a temporary resident. A foreign national who is the subject of such a declaration must not seek to enter or remain in Canada as a temporary resident (clause 6; new section 20(1.1) of IRPA).Temporary residents include visitors, students and temporary workers.

The declaration by the Minister is founded on his or her opinion that it is justified by public policy considerations, a concept that is not defined in IRPA. However, clause 11 provides that regulations may be drafted for this new section of IRPA, which may contain a definition of what constitutes public policy considerations.

The Minister must specify a validity period for each declaration. Clause 8 indicates that the maximum period is 36 months, although the Minister has the discretion to revoke a declaration or shorten the effective period. Clause 3 of Bill C-43 indicates that this ministerial power under new section 22.1 may not be delegated (amends section 3 of IRPA).

The criteria[16] that an officer must use to satisfy himself or herself that a foreign national should be allowed to enter and acquire the status of temporary resident do not change, except for a technical amendment to allow for the fact that a foreign national must not be the subject of a declaration under section 22.1 of IRPA (clause 7; new section 22(1)).

2.3 Other Changes

2.3.1 New Regulatory Authorities Regarding Applications

2.3.1.1 Power to Inspect and Require Documents (Clause 4)

Clause 4 introduces new section 14(2)(*f.1*) into IRPA, allowing regulations to empower officers to inspect and require documents for the purpose of verifying compliance with undertakings. Undertakings are currently required in the family sponsorship context to hold sponsors accountable for financial assistance provided to their sponsored relatives. Although the relevant provisions are not yet in force, the *Protecting Canada's Immigration System Act* (Bill C-31)[17] has considerably expanded the scope of possible undertakings. Under that Act, regulations may provide that persons applying for a visa for permanent or temporary status need to comply with an undertaking. As well, persons applying for humanitarian and compassionate considerations may need to obtain an undertaking from a third party.

2.3.1.2 Power to Impose Conditions on Employers and Educational Institutions (Clause 12 and Coordinating Amendment 37(2))

Part 4, Division 54, of the *Jobs, Growth and Long-term Prosperity Act* (Bill C-38)[18] amended IRPA, providing authority for regulations to impose requirements on employers in relation to the authorization of a foreign national to work in Canada. Compliance with these requirements is subject to verification by an officer who has the power to inspect. Lastly, the new regulatory authority may provide consequences if the employer fails to comply with the imposed requirements.

Bill C-43 introduces broader regulatory authority that applies to educational institutions in addition to employers. Furthermore, the power to inspect is now similar to the one verifying undertakings discussed in section 2.3.1.1, above. The consequences for the failure to comply with conditions imposed now apply to both the permanent residents and foreign nationals referred to in section 32(*d*) of IRPA

and the individual, employer or educational institution referred to in new section 32(*d.1*).

Because the relevant provision of the *Jobs, Growth and Long-term Prosperity Act* is already in force, the coordinating amendment provides that the regulatory authority provided in Bill C-43 replaces that of the current Act (clause 37(2)(*b*)).

2.3.1.3 Renunciation of Permanent Resident Status (Clauses 20 and 21)

Under current legislation, an individual may lose his or her permanent resident status, but IRPA does not provide a mechanism by which the permanent resident can formally renounce it; Bill C-43 introduces such a mechanism. Clause 20 states that an application must be made by the permanent resident, and an officer must approve this application (new section 46(1)). A person who renounces permanent resident status while in Canada becomes a temporary resident for six months after the application is approved (new section 46(1.1)). This does not occur if the status is renounced at a port of entry or if the application is approved when the foreign national is not physically present in Canada. Regulations may be drafted to describe the form and manner in which the application to renounce permanent resident status must be made and which conditions are necessary for approval by the officer (clause 21; new section 53(1)(*a.1*) of IRPA).

2.4 Transitional Provisions, Coordinating Amendments and Coming into Force

2.4.1 Transitional Provisions (Clauses 28 to 35)

There are a number of transitional provisions, some of which will come into force upon Royal Assent (clauses 28 to 29 and 32 to 33) and others that will come into force on a day to be fixed by an order of the Governor in Council (clauses 30 to 31, and 34 to 35). Clause 29 allows the continued processing under pre-existing legislation of an application for permanent residence under humanitarian and compassionate considerations, for which no decision has been made upon coming into force of clause 9.[19] Clause 32 maintains the right of appeal to the Immigration Appeal Division of a person whose application to sponsor a member of the family class would otherwise no longer exist because the family class member would be inadmissible on grounds of serious criminality within the new definition introduced by clause 24. Clause 33 states that the new definition of serious criminality for the purposes of access to the Immigration Appeal Division applies only to people reported inadmissible on or after the day Bill C-43 receives Royal Assent.

The transitional provisions provide that when circumstances permit, or when the Minister of Public Safety makes an application, the prescribed conditions that have been established by Bill C-43 are to be imposed on individuals who are the subject of an inadmissibility report on security grounds, a removal order for the same reason or a security certificate (clauses 30, 31, 34 and 35). Clause 31 is technically amended by clause 36(7)(*b*) of Bill C-43, which has the effect of renumbering subsections in section 58.

2.4.2 Coordinating Amendments (Clauses 36 and 37)

Coordinating amendments play a key role in Bill C-43, as the bill was written before Royal Assent and coming into force of certain provisions of previously mentioned bills C-31 and C-38 on 28 and 29 June 2012 respectively.

Clause 36 relates to sections from the *Protecting Canada's Immigration System Act* (Bill C-31) concerning delegation of powers, applications based on humanitarian and compassionate considerations, and detention for designated foreign nationals, now in force. Clause 36 provides that the sections of Bill C-43 related to delegation of powers (section 3) and humanitarian and compassionate considerations (section 9) are replaced upon Royal Assent of Bill C-43 to include the elements of both Acts.

Although clauses 22 and 23 of Bill C-43 concern prescribed conditions that must be imposed on a person with an inadmissibility report on security grounds and will not come into force before a day ordered by the Governor in Council, clauses 36(4) and 36(7) replace the initial text in Bill C-43 immediately to reflect the coming into force of the relevant sections of Bill C-31. Clauses 36(10) regarding the release of designated foreign nationals by the Minister and 36(11) regarding regulations for prescribed conditions will modify IRPA only on the day that clause 23 of Bill C-43 comes into force (by order of Governor in Council).

Clause 37 makes an amendment to provisions brought in by the *Jobs, Growth and Long-Term Prosperity Act*, replacing the sections introduced by clause 705 of Bill C-38 that came into force upon Royal Assent of the bill with regulations that are more comprehensive. These are discussed in detail in section 2.3.1.2 regarding new regulatory authorities.

2.4.3 Coming into Force (Clause 38)

Many provisions of Bill C-43 – such as the changes to inadmissibility on grounds of security and the new provisions for ministerial relief for foreign nationals who are inadmissible on grounds of security, violating human and international rights and organized criminality – come into force upon Royal Assent. Persons inadmissible on grounds of security, violating human and international rights and organized criminality will no longer be able to make applications for permanent residence based on humanitarian and compassionate considerations. The new definition of serious criminality comes into force upon Royal Assent and removes the right to appeal to the Immigration Appeal Division for those now included in the broader definition.

Clauses 6, 7 and 8 relating to the new declaration power, clause 16 relating to the change to inadmissibility on grounds of misrepresentation, clause 17 introducing the change to inadmissibility regarding family members, and clause 20 relating to the new formal renunciation of permanent resident status will come into force on a day or days to be fixed by order of the Governor in Council.

The clauses of Bill C-43 regarding prescribed conditions for individuals inadmissible on security grounds will all come into force on a day to be fixed by order of the Governor in Council (clauses 19, 22, 23, 25 to 27, 30, 31, 34 and 35).

3 COMMENTARY

Much of the public commentary on Bill C-43 has focused on the loss of the right to appeal removal orders for persons convicted of sentences of six months or more. Indeed, this aspect is emphasized by the short title of the bill and has been discussed in the media. The following commentary will address this issue, as well as other changes contained in the bill.

3.1 NEW DEFINITION OF SERIOUS CRIMINALITY FOR DENYING ACCESS TO THE IMMIGRATION APPEAL DIVISION

Bill C-43 changes the definition of "serious criminality" as it relates to the right to appeal inadmissibility to the Immigration Appeal Division so that the term applies to a crime that was punished in Canada by a term of imprisonment of at least six months rather than two years. The government argues that this change will reduce the amount of time that permanent residents with certain criminal convictions may remain in Canada.[20]

Editorials in major Canadian newspapers have supported this change because of the expected outcome. As summarized in a *Globe and Mail* editorial, "the tiny share of immigrants and refugees who lack citizenship and are convicted of serious crimes on Canadian soil forfeit their right to be here."[21] Another questioned why Canada should keep people who, during the "probationary" period of permanent residence, have demonstrated that they are a danger to society. The author stated that this is a sensible bill whose provisions people would be surprised to know aren't already law.[22]

However, another commentator has suggested that appealing to the Immigration Appeal Division adds relatively little time to a person's stay in Canada and that this solution is not the best option for addressing the policy problem identified by the Minister. The commentator suggested instead that effort be put into reducing the barriers that delay removal, which can include difficulties obtaining travel documents, locating persons, and on-going legal proceedings.[23]

It has also been suggested that this change broadens the net too greatly, so that people convicted of offences that ordinary people may not consider serious, such as threatening or mischief, will be included.[24] Further, some commentators are concerned that, without access to the appeal, there is no avenue to take into account the circumstances of the offender, such as whether it was a first offence or how children or family might be affected by the deportation.[25]

Finally, some people are concerned that this change applies regardless of the person's length of residence in Canada. One leading lawyer said that the majority of permanent residents in his caseload who are appealing removals had lived in Canada since childhood.[26] Such individuals may know no home other than Canada and may be non-citizens because of negligence or oversight on the part of their parents. Ahmed Hussen of the Canadian Somali Congress has expressed concern that the bill will lead to increased numbers of young immigrant males deported

without appeal, including Somali refugees raised mainly in Canada, who have little or no connection to the land of their birth.[27]

3.2 Declaration That an Individual May Not Be Granted Temporary Resident Status

Bill C-43 grants the Minister of Citizenship and Immigration the authority to issue a declaration that a certain individual may not become a temporary resident for up to three years because of "public policy considerations."

This might be a welcome change for those who believe that the Minister does or should have this power. For example, the Quebec legislature passed a motion on 18 October 2011 demanding that the federal government "deny entry to Canada to Abdur Raheem Green and Hamza Tzortzis in view of their homophobic statements and their discourse trivializing violence against women."[28] However, the Minister did not have such a discretionary power at the time.

Some commentators have raised concerns that this provision provides the Minister with too much power.[29] Even without this discretionary power under current legislation, advocacy groups and politicians lobby against particular high-profile speakers gaining entry to Canada. As illustrated by recent examples, such as the case of former member of the British parliament, George Galloway,[30] decisions about who may enter Canada can have strong symbolic and political value, making the impartial and consistent application of the law important. However, as with any administrative decision, declarations could be subject to judicial scrutiny at the Federal Court.

NOTES

1. *Immigration and Refugee Protection Act* [IRPA], S.C. 2001, c.27.
2. Citizenship and Immigration Canada, *Introducing the* Faster Removal of Foreign Criminals Act.
3. Under the criminality-related inadmissibility provision in IRPA (s. 36), permanent residents may only be found inadmissible for serious offences (s. 36(1)), whereas foreign nationals may be found inadmissible for serious and lesser offences (s. 36(2)). Bill C-43 amends serious criminality-related provisions.
4. The three types of removal orders are outlined in *Immigration and Refugee Protection Regulations* [IRPR], SOR/2002-227, sections 223 to 227. Those issued a *departure order* are not required to obtain authorization to return to Canada; those issued an *exclusion order* are required to obtain written authorization to return to Canada during the one-year period after the exclusion order was enforced; and those issued a *deportation order* are required to obtain written authorization to return to Canada at any time.
5. IRPA, s. 45.

6. Section 64 of IRPA states that no appeal may be made to the Immigration Appeal Division by a foreign national or the foreign national's sponsor or a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. For this purpose, serious criminality is defined as a crime that was punished in Canada by a term of imprisonment of at least two years. Section 64 is amended by Bill C-43.

7. Protected person are persons granted Canada's protection as refugees according to the *United Nations Convention Relating to the Status of Refugees* or because of risk to their lives or risk of torture, cruel and unusual treatment or punishment.

8. IRPA, s. 67, 68 and 69.

9. IRPA, s. 58, and IRPR, SOR/2002-227, s. 244.

10. Signing the security certificate is an action that cannot be delegated, and can only be exercised by the ministers: IRPA, ss. 6 and 77.

11. As signatory to the 1951 United Nations *Convention Relating to the Status of Refugees* and its Protocol and the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Canada cannot return those with protection needs to a place where they will be at risk of persecution or at risk of torture, cruel and unusual treatment or punishment.

12. IRPR, s. 23.

13. *Canada (Public Safety and Emergency Preparedness)* v. *Agraira*, 2011 FCA 103.

14. The hearing is tentatively set for 18 October 2012. The case summary can be found at the Supreme Court of Canada, *Muhsen Ahemed Ramadan Agraira* v. *Minister of Public Safety and Emergency Preparedness*, "SCC Case Information: Summary – 34258," *Cases.*

15. IRPA, s. 4.

16. IRPA, s. 22.

17. *An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act* (short title: *Protecting Canada's Immigration System Act*), S.C. 2012, c. 17 (Royal Assent 28 June 2012).

18. *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures* (short title: *Jobs, Growth and Long-term Prosperity* Act), S.C. 2012, c. 19 (Royal Assent 29 June 2012).

19. Clause 9 comes into force upon Royal Assent of Bill C-43.

20. Citizenship and Immigration Canada, *"Government of Canada Introduces the* Faster Removal of Foreign Criminals Act," News release, 20 June 2012.

21. *Globe and Mail* [Toronto], "Kenney is right to speed up deportations," Editorial, 24 June 2012.

22. Lorne Gunter, "Kenney closes gaping loopholes," *Edmonton Sun*, 21 June 2012.

23. Gordon Maynard, "The Federal Government Is Telling Foreign Criminals That They Will Send Them Packing," *CKNW Radio*, 25 June 2012.

24. Ibid.

25. Laura Payton, "Sweeping immigration changes to give new power to minister," *CBC news*, 20 June 2012; Andrew J. Brouwer, "Kenney is stripping away compassion," *Embassy*, 23 July 2012.

26. Maynard (2012).

27. Fred Chartrand, "Kenney's refugee bill could deport young, mentally ill," *CBC news*, 12 July 2012.

28. Quebec National Assembly, *Votes and Proceedings of the Assembly*, No. 50, 2nd Session, 39th Legislature, 18 October 2011, p. 612.

29. Payton (2012); Kelly McParland, "Jason Kenney's immigration revolution chalks up another success," *National Post*, 22 June 2012.

30. Mr. Galloway's case is presented in *Toronto Coalition to Stop the War v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 957. Known for his passionate and controversial views on Israeli action in Palestine, Mr. Galloway was scheduled to make a speaking tour in Canada in March 2009. According to the Federal Court record, the office of the Minister of Citizenship and Immigration was alerted to his upcoming tour and asked that he be prohibited from entering Canada. At the request of the Minister's office, a preliminary inadmissibility assessment was conducted and communicated to Mr. Galloway, informing him that, should he appear at a border crossing, he might be found inadmissible on grounds of national security. Mr. Galloway chose not to be confronted with this possibility and did not present himself at the border. While the matter was dismissed from Federal Court because no immigration decision had actually been taken, Justice Mosley made the following remarks:

> It is clear that the efforts to keep Mr. Galloway out of the country had more to do with antipathy to his political views than with any real concern that he had engaged in terrorism or was a member of a terrorist organization. No consideration appears to have been given to the interests of those Canadians who wished to hear Mr. Galloway speak or the values of freedom of expression and association enshrined in the *Canadian Charter of Rights and Freedoms*.